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Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 122.

DANIEL H. CARSTAIRS ET AL., PLAINTIFFS IN ERROR,

vs.

WILLIE B. COCHRAN, TREASURER AND COLLECTOR OF BALTIMORE COUNTY.

BRIEF FOR THE PLAINTIFFS IN ERROR.

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(18,654.)

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DANIEL H. CARSTAIRS AND JOHN H. CARSTAIRS, COPARTNERS TRADING AS CARSTAIRS BROTHERS, PLAINTIFFS IN ERROR,

vs.

WILLIE B. COCHRAN, TREASURER AND COLLECTOR OF BALTIMORE COUNTY, DEFENDANT IN ERROR.

BRIEF FOR THE PLAINTIFFS IN ERROR.

STATEMENT OF THE CASE.

This is an action of assumpit begun in the circuit court for Baltimore county, a court of general jurisdiction in law and equity, by the treasurer and collector of Baltimore county, to recover taxes alleged to be due from the plaintiffs in error (who are distillers operating a distillery in said county), for the year 1900, under an act of the General Assembly of Maryland, chapter 704, passed in the year 1892.

The parts of this act material to the present controversy are as follows:

"SECTION 1. *Be it enacted by the General Assembly of* " *Maryland,* That there shall be levied and collected upon

"all distilled spirits in this State as personal property the "same rate of taxation which is imposed by the laws of the "State on other property for State and county purposes.

"SECTION 2. *And be it enacted*, That for the purpose of "such assessment and collection it shall be and is hereby "made the duty of each distiller, and of every owner or "proprietor of a bonded or other warehouse, in which dis- "tilled spirits are stored and of every person or corporation "having custody of such spirits, to make report to the State "tax commissioner on the first day of January in each and "every year of all the distilled spirits on hand at such date, "and the tax for the ensuing year from the said first of "January, shall be levied *and paid* on the amount of dis- "tilled spirits so on hand, as representing the taxable dis- "tilled spirits for such year, provided, however, that the "same distilled spirits shall not be taxed twice for the same "year.

"SECTION 3. *And be it enacted*, That the said tax commis- "sioner upon receiving said report shall fix the value of said "spirits for the purpose of taxation under this act, and "whenever the spirits are distilled by persons doing busi- "ness as a corporate body and having shares of capital "stock, the valuation by the tax commissioner shall be upon "the spirits, as personal property, without reference to its "capital stock which shall be treated as distinct from said "distilled spirits as reported and such valuation put upon "said stock as not to produce double taxation, and the said "tax commissioner shall without delay, transmit a copy of "said valuation by mail to the appeal tax court of Balti- "more city, and to the board of county commissioners in "the counties where distilleries are situate and all distilled "spirits upon the valuation and return so made, shall be "subject to municipal and county taxation as all other per- "sonal property located within the bounds of any county; "and the county commissioners of the counties where dis- "tilleries are situate, and the mayor and city council of "Baltimore are directed and required in making their an- "nual levies to impose upon the spirits so returned and "valued by the State tax commissioner the State taxes as "the same are prescribed by law.

"SECTION 4. *And be it enacted*, That it shall be the duty "of the distiller, owner or custodian, as hereinafter indi- "cated and described to make quarterly reports on the first

"days of January, April, July and October, in each year "between the first and fifth days of such months showing "all deliveries during the preceding current quarter, from "his custody or care, of any part of the distilled spirits so "reported; said delivery report to be made to the tax com- "missioner of this State, who shall without delay transmit "a copy of such report by mail to the appeal tax court of "Baltimore city and to the board of county commissioners "of those counties in which distilleries are situate; and said "distiller, owner or custodian shall also at the same time he "makes a delivery report to the tax commissioners make "said report in duplicate to the collector or other proper "officers designated by law to receive and collect taxes for "the county or city in which such distillery is situate, and "shall in each case along with said report to the collector, "make a remittance and payment of the tax upon such dis- "tilled spirits which shall be accounted for by said officer as "other State and county taxes are accounted for.

"SECTION 5. *And be it enacted*, That no distiller, owner, "or custodian of such distilled spirits shall permit the same "to go from his possession or control without the report and "payment of tax hereinbefore provided for, and any person "or persons or corporation violating the provisions of this "section shall be proceeded against by the proper officer "authorized to receive said taxes by distraint for the entire "amount of the taxes assessed for the current year, and "thereupon all such taxes shall become and be immediately "due and collectible by distraint, together with all costs at- "tending the proceedings and a further penalty of five "hundred dollars for each such violation.

"SECTION 8. *And be it enacted*, Any warehouseman, cus- "todian or agent, paying the tax on distilled spirits herein "provided for, shall have a lien upon the distilled spirits "covered by such tax."

This act having been held unconstitutional as to Baltimore city in the case of the Monticello Distilling Company *vs.* The Mayor and City Council of Baltimore, 90 Md., 416, because of its failure to provide for giving any notice of the assessment or an appeal, the General Assembly of 1900, by an act of that year, chapter 320, amended the third section

and added a section 12, but it is not material to the present controversy.

The plaintiffs in error, who were residents of the State of Pennsylvania, resisted the payment of the tax on the ground that the act required them to pay taxes on spirits *not belonging to them*, in their bonded warehouses, *and represented by negotiable warehouse certificates held by persons unknown to them.*

The docket entries and pleadings are shown on pages 8–12 of the transcript of record. As appears thereby, the plaintiffs in error demurred to the four counts of the declaration, and it was sustained as to the third and fourth and overruled as to the first and second counts. An amended declaration was filed and a demurrer to the third, fourth, and fifth counts of it was overruled, and pleas being filed to all counts and issues joined, the action was tried before a jury and a verdict found and judgment thereon entered for the defendant in error. The defendant in error having offered evidence tending to prove the facts of his case, and having closed (pp. 12–16), and the plaintiffs in error having proved their ownership of the distillery and the fact that they had made a return to the State tax commissioner of spirits on hand on January 1, 1900, their counsel then asked the witness (John H. Carstairs, one of the plaintiffs in error) the following question:

"Q. Did you own any of these spirits that were so returned?" and the defendant in error objected thereto and the court sustained the objection, which occasioned the first exception (p. 16).

The plaintiff in error then made the following offer:

"Mr. FISHER: If your honor pleases, to make our proposi-
"tion clear, I will submit the following offer:
"The defendants offer to prove by the witness, John H.
"Carstairs, and by Mr. Donaldson that the defendants on
"the first day of January, 1900, did not own any of the
"whiskey mentioned in the tax bill offered in evidence, and

"in the return made by the defendants to the State tax "commissioner in January, 1900, excepting 489 barrels, and "that the defendants have not owned any of said spirits since "that time excepting those 489 barrels, but that all of said "whiskey, excepting said 489 barrels, belonged to other "persons unknown to the defendants, who held negotiable "warehouse certificates therefor, evidencing their owner-"ship."

The refusal of the court to permit this evidence to be offered occasioned the second exception (p. 17).

The plaintiffs in error then proved that the spirits on hand on January 1, 1900, were in their different *bonded warehouses* (p. 17).

The next exception was the ruling of the court in refusing to permit the manager in charge of the distillery or bonded warehouses to describe the control the internal revenue officials of the United States had and exercised over the distillery and bonded warehouses (p. 17).

And the plaintiffs in error then proved that the return made by them to the State tax commissioner did not show whether the spirits mentioned therein were owned by them or by other persons (p. 17).

After some evidence offered in rebuttal by the defendant in error, which is not material, the evidence being all in, he offered two prayers, which were granted (p. 22).

The first prayer in substance instructed the jury that if the State tax commissioner reported to the county commissioners the number of barrels of whiskey and his valuation thereof, which were in the custody of the plaintiffs in error on January 1, 1900, and the county commissioners levied the taxes thereon for the year 1900, and that the plaintiffs in error did not pay them, the verdict should be for the amount of the taxes claimed.

The second prayer is substantially the same, except that it introduces some other facts not material to the present discussion.

The plaintiffs in error then offered eight prayers (pp. 22–42).

The second, third, fifth, and eighth prayers are the only ones which will be discussed.

The second prayer asserts that there is no evidence that the plaintiffs in error were on January 1, 1900, the owners of any of the whiskey mentioned in the tax bill, and that it would be contrary to the law of the land and a taking of the property without due process of law to require them to pay taxes on whiskey in their *bonded* warehouses belonging to other persons.

The third prayer asserts that there is no evidence that the State tax commissioner was authorized by law to value the spirits (whiskey), or that the county commissioners were authorized by law to levy the tax claimed—the meaning intended was that the tax law itself, being unconstitutional, conferred no authority on those officials.

The fifth prayer is substantially the same as the third, and was intended to convey the same meaning.

The eighth prayer is substantially the same as the preceding mentioned prayers.

The court rejected all the prayers of the plaintiffs in error, and its action on the prayers of both litigant parties occasioned the fifth bill of exceptions.

The judgment being against the plaintiffs in error, they appealed to the court of appeals of the State, being the highest appellate court, and the ruling of the circuit court having been by it affirmed (Opinion, pp. 25–34), the plaintiffs in error sued out the writ of error.

ASSIGNMENT OF ERRORS.

The plaintiffs in error assign as errors that the circuit court for Baltimore county and the court of appeals of Maryland, in affirming the rulings of the said circuit court, erred in their rulings and action in this:

1. In overruling the demurrer of the plaintiffs in error to the third, fourth, and fifth counts of the amended declaration (p. 11).

2. In refusing to permit the plaintiffs in error to ask the witness John H. Carstairs the following question:

"Q. Did you own any of the spirits that were so returned?" (p. 16).

3. In refusing to permit the plaintiffs in error to offer evidence of the facts stated in the following offer of evidence:

"The defendants offer to prove by the witness, John H. "Carstairs and Mr. Donaldson, that the defendants on the "first day of January, 1900, did not own any of the whiskey "mentioned in the tax bill offered in evidence, and in the "return made by the defendants to the State tax commis- "sioner in January 1900, excepting 489 barrels, and that the "defendants have not owned any of said spirits since that "time, excepting those 489 barrels, but that all of said "whiskey, excepting said 489 barrels, belonged to other per- "sons unknown to the defendants, who held negotiable ware- "house certificates therefor, evidencing their ownership" (p. 16).

4. In granting the following prayers at the request of the defendant in error:

PLAINTIFF'S FIRST PRAYER.

"If the jury find that the State tax commissioner on or "about the 28th day of February, 1901, made return to the "county commissioners of Baltimore county of the number "of barrels of spirits and the valuation set thereon by said "tax commissioner held by the defendants, or in their cus- "tody on the first day of January 1900, as appears by the "return offered in evidence and that the county commis- "sioners of Baltimore county in making their levy for State "and county taxes for the year 1900, included in their said "levy the sum of four thousand five hundred dollars for "taxes due by all the distilleries in Baltimore county, in- "cluding the taxes estimated to be due by the defendants "for that year; and if the jury shall find that defendants "have not paid the taxes on said spirits so returned by the "tax commissioners, or any part thereof, then the verdict of "the jury in this case should be for the amount of taxes "claimed by the plaintiff with interest thereon from June "14th, 1901.

"(Granted.)"

PLAINTIFF'S SECOND PRAYER.

"If the jury shall find that the defendants in the month "of January, 1900, made return to the State tax commis- "sioner, under the act of 1892, capter 704, of the amount of "spirits in their bonded warehouse on the first of January, "1900, and that the State tax commissioner valued said "spirits at eight dollars per barrel, and that on the 19th day "of April, 1900, the State tax commissioner wrote to the "county commissioners of Baltimore county, saying that he "would transmit the returns of spirits held in the ware- "houses in Baltimore county the following week, and that "the same was not sent until on or about 28th February, "1901, and if they further find that the county commis- "sioners in making their levy for State and county taxes for "the year 1900, made the same upon an estimate of the four "thousaud five hundred dollars due for spirits by the dis- "tilleries situated in Baltimore county, and included therein "the taxes estimated as proper to be levied for taxes due by "defendants for spirits for the year 1900, under the act of

"1892, chapter 704, aforesaid, and if they find that said de-
"fendant has not paid taxes on said spirits for the year
"1900, then the verdict in this case should be for the plain-
"tiff for the amount of the tax claimed with interest thereon
"from June 14th, 1901.
"(Granted.)"

5. In rejecting the following prayers offered by the plaintiffs in error:

DEFENDANTS' SECOND PRAYER.

"The court instructs the jury that there is no evidence in
"this case that the defendants were the owners on January
"1st, 1900, or subsequently thereto, of any of the whiskey
"mentioned in the tax bill and return of the tax commis-
"sioner offered in evidence, and that it would be contrary
"to the law of the land and a taking of property of the de-
"fendants without due process of law, to require them to
"pay taxes upon whiskey in the defendants' bonded ware-
"houses on January 1st, 1900, or thereafter belonging to
"persons other than the defendants, and their verdict must
"therefore be for defendants.
"(Refused.)"

DEFENDANTS' THIRD PRAYER.

"The court instructs the jury that there is no evidence in
"this case that the State tax commissioner was authorized
"by law to value the spirits mentioned in the evidence to
"the defendants, or that the county commissioners were au-
"thorized by law to levy the tax claimed by the plaintiff
"upon said spirits, and their verdict must therefore be for
"the defendants.
"(Refused.)"

DEFENDANTS' FIFTH PRAYER.

"The court instructs the jury that there is no evidence in
"this action that there was any lawful levy of the taxes
"claimed in this action upon the spirits mentioned in the
"evidence, and their verdict must be for the defendants.
"(Refused.)"

DEFENDANTS' EIGHTH PRAYER.

"The court instructs the jury that the plaintiff is not entitled to recover in this action because—

"1. There is no evidence that the defendants were on the first day of January, 1900, or thereafter, the owners of any of the spirits mentioned in the evidence.

"2. Because there is no evidence of any obligation on the defendants to pay the taxes claimed in this action.

"3. Because there is no evidence in this action that the State tax commissioner had lawful authority to value the spirits mentioned in the evidence to the defendants, or that the defendants were lawfully assessed therewith, and that the verdict of the jury must be for the defendants.

"(Refused.)"

6. In holding the act of 1892, chapter 704, a valid and constitutional enactment, and in holding valid and lawful the tax claimed by the defendant in error in this action upon spirits in the bonded warehouses of the plaintiffs in error, not belonging to them, but to other persons, unknown to the plaintiffs in error, and represented by negotiable warehouse certificates held by the owners of said spirits.

ARGUMENT.

The position of the plaintiffs in error is that the act of 1892, chapter 704, requires the distiller and the owner of a bonded or other warehouse to pay out of his own funds taxes due from owners of spirits stored therein who hold negotiable warehouse certificates therefor and are unknown to the distiller or warehousemen, and that such an act is repugnant to natural justice and to the first section of the fourteenth amendment to the Constitution of the United States. It requires one man to pay the debt of another.

I.

It is a principle of every system of law that every man shall be protected in the enjoyment of his property, and that it shall not be taken from him without just compensation. It finds expression in the earliest constitutions, and in Magna Charta the guarantee is that no freeman shall be disseized of his freehold but "by the judgment of his peers or by the law of the land."

10 Am. & Eng. Ency. of Law, 2d edit., 290.

And the law of the land must necessarily be consistent with the constitutional provisions or it cannot stand. If, therefore, any law is repugnant to the Constitution it cannot stand; it is no law at all. The "law of the land" means *constitutional* law. The Constitution of the United States guarantees that—

"No State shall *make or enforce* any law which shall abridge "the privileges or immunities of citizens of the United "States, nor shall any State deprive any person of life, liberty "or property without due process of law * * *"

Sec. 1, 14th amendment, Constitution U. S.

One of the privileges of every one, recognized in the fourteenth amendment, is the enjoyment of one's property with immunity from seizure under color of a law essentially repugnant to the Constitution, and nowhere is this more plainly stated than in the case of Thistle, &c., *vs.* Frostburg Coal Co., 10th Md., 144, in the following language:

"It is clearly not within the scope of the legislative power "to give to a law the effect of taking from one man his prop-"erty and giving it to another," &c.

The facts of that case bear no similarity to the present controversy; but that is immaterial. The principle is recognized that the property rights of individuals are inviolable. The

legislature has no more right to take one man's property and give it to the Government to pay taxes due upon the property of another, than it has to take it and give it to another person.

This court expressed the same idea in language more apposite to the facts of this case in case of Hartman *vs.* Greenhow, 102 U. S., 684, bottom, as follows:

"* * * Surely it is not necessary to argue that an "act which requires the holder of one contract to pay the "taxes levied upon another contract held by a stranger can-"not be sustained. Such an act is not a legitimate exercise "of the taxing power; it undertakes to impose upon one the "burden which should fall, if at all, upon another."

The reference to this case in the argument in the Court of Appeals was said by it to be entirely inappropriate, because it was said in the court's opinion that the facts of that case bore no similarity to this.

The facts were that a citizen of Richmond, Virginia, who held certain coupons originally attached to bonds of the State of Virginia issued under an act making the coupons receivable for taxes, tendered them to the city treasurer in payment of taxes due from him; but the treasurer refused to accept them without first applying them in payment of taxes due on the bonds themselves, which were held by some other person, and defended his position by relying upon an act of that State which expressly required that the taxes upon the bonds should be collected at the time of the payment of the interest thereon, and made it a high penal offense to receive coupons in payment of taxes without deducting from their face value the taxes due upon the bonds from which they were taken.

The main argument was that the act impaired the obligation of contract; but this court, in addition to holding the act unconstitutional because it impaired the obligation of the contract, also rested its argument against the validity of

the act upon the impossibility of any law being valid which required one man to pay the tax due from another, in the language we have quoted.

But whether the facts of that case are similar to the facts of this is not very material. The principle is maintained that one man's goods cannot be taken to pay another's taxes.

Another illustration of the application of the principle may be seen in the case of

Camp *vs.* Rogers, 44 Conn., 291.

A statute of Connecticut provided that—

"the driver of any vehicle meeting another on the public "highway, who shall neglect to turn to the right, and thereby "drive against the vehicle so met, and injure its owner or "any person in it, or the property of any person, shall pay "to the party injured, treble damages; and that the owner "of the *vehicle so driven* shall, if the driver be unable to do "so, pay such damages," etc.

It was contended in this case that the *owner* would be liable, even though he was not in the vehicle and had no control over the driver. At 296:

"Such a result is in itself so absurd as either to show that "the statute should not be so construed as to produce it, or "that, if this be a correct construction, it is so far void, either "as manifestly against natural justice or of violating that "article of the Constitution which forbids the taking away "of any man's property *without due process of law*. If such a "law so construed were to be held valid, then a law that "should by a merely arbitrary rule make one man liable "for the debts of another would be valid."

But it is useless to multiply examples to prove a principle so fundamental.

II.

That the act of 1892, chapter 704, violates the fundamental principle of the right of persons to be secure in the possession and enjoyment of their property, we submit there can be no doubt, if the act is to be considered as applicable to spirits belonging to others in bonded warehouses of the distiller. In the following cases the court took the contrary view :

Monticello Distilling Co. *vs.* Mayor & City Council of Balto., 90 Md., 416.

Kemp *vs.* Fowble, 92 Md., 8.

Carstairs *vs.* Cochran, 95 Md., 498, &c. (the last mentioned being the present case).

The court of appeals thought the act was lawful

A

because the act, though requiring the distiller or warehouseman to pay the taxes of other persons unknown to them, gives a lien upon the spirits for the payments so made.

It is quite obvious that the act did not contemplate that the distiller or warehouseman should pay the tax out of the funds of the owner of the spirits, for it provides that on paying them he shall have a lien (sec. 8).

Plainly he is to have a lien to secure him for money of his own so laid out, not money of the owner of the spirits.

The legislature knew very well that the distiller or warehouseman must necessarily, in order to perform the law, pay with his own money the taxes due from other persons.

A law of such a character would seem plainly to be a stretch of legislative power, even if an effective and complete lien were given for the money so paid, with machinery for its prompt enforcement. But where no mode for its en-

forcement is provided, as is the case here, the injustice of the law and its violation of fundamental rights are made conspicuous.

Without special provision for the enforcement of the lien, the distiller is left to the slow and expensive remedy of a suit in equity for its enforcement, if, indeed, it could be enforced at all. It is, indeed, a lean lien.

But when the provisions of the internal-revenue laws are borne in mind, the hardship and injustice of this law are still more conspicuous. They put an officer of the United States in charge of every bonded warehouse, and from the moment the spirits come into being they are in his custody, and are subject to the internal-revenue tax of $1.10 per gallon (R. S., sec. 3251*a*). He holds in his posession the key of the warehouse, and no one—not even the owner himself—can enter it except in the company of the officer in charge when admitted by his key.

R. S., secs. 3271–3272.

Spirits and whiskey, as a rule, are sold as soon as made, and pass into the bonded warehouse as the property of the purchasers. The title to them is represented by negotiable warehouse certificates, issued to the purchaser, which pass from hand to hand as freely as bank notes. Sold to a resident of Baltimore today, they may be the property of a resident of Illinois tomorrow, and after the delivery of the warehouse certificate, the distiller or warehouseman cannot know who is the owner of the spirits until the holder of the certificate presents it to withdraw the goods.

By act of Congress the owner may leave the spirits in the warehouse, internal revenue tax unpaid, for a period of eight years.

Under these circumstances, the situation of the distiller or warehouseman who obeys this law of 1902 is hard indeed. He cannot well enforce the lien the act purports to give him for two reasons:

FIRST. Because there is a certificate, the title paper of ownership of the spirits, in the hands of some one unknown, stating upon its face, over the signature of the warehouseman, that the spirits are in the warehouse, to be delivered to the bearer of it on presentation. The statutes of Maryland provide as follows:

"* * * All warehouse, elevator or storage receipts "whatsoever for goods, chattels or commodities of any kind "stored or deposited, or in said receipts stated or acknowl- "edged to be stored or deposited for any purpose in any ware- "house, elevator or other place of storage or deposit in this "State, shall be and they are hereby constituted and declared "to be negotiable instruments and securities, unless it be pro- "vided in express terms to the contrary on the face thereof, in "the same sense as bills of exchange and promissory notes, and "full and complete title to the property in said instruments "mentioned or described, and all rights and remedies inci- "dent to such title, or arising or derivable from the said in- "strument, shall enure to and be vested in each and every "*bona fide* holder thereof for value, altogether unaffected by "any rights or equities whatsoever, of or between the origi- "nal or any other prior holders of or parties to the same, of "which such *bona fide* holder for value shall not have had "actual notice at the time he became such."

Section 1, Art. 14, Code of Public General Laws of Maryland.

"* * * No person or corporation whatsoever, having "issued or having outstanding as aforesaid any such re- "ceipt, acceptance of order or other voucher aforesaid, and "no agent or officer of any such person or corporation shall "part with, deliver or remove, or permit to be delivered or "removed, the goods, chattels or commodities in such in- "strument named or described, or any part thereof, except "only to or by the holder of said instrument, or upon his "order, and upon the presentation of said instrument with "his endorsement in every case, or without canceling or "destroying said instrument in case of complete delivery or "removal or endorsing thereon the quantity and description "of the goods, chattels or commodities delivered or removed, "and the names of the persons to whom delivered, or by

"whom removed, in case such delivery or removal shall be "partial only; and any principal person or corporation or "agent or officer of any person or corporation wilfully vio- "lating this section or any of the provisions thereof, shall "be guilty of a misdemeanor, punishable by a fine of not "less than one thousand, nor more than five thousand dol- "lars in the case of a corporation, and in the case of an in- "dividual by a fine of not less than one hundred, nor more "than five thousand dollars, and imprisonment in the peni- "tentiary for a period of not less than one year, nor more "than three years, in the discretion of the court."

Sec. 6, Art. 14, Code of Public General Laws of Md.

The attempt to enforce the lien before the owner of the spirits produced the warehouse receipts would, therefore, necessitate a breach of faith and contract on the part of the warehouseman and subject him to a fine and imprisonment in the penitentiary, unless the act of 1892 could be considered as relieving the warehouseman from these penalties and authorizing him to ignore his warehouse receipts and to withdraw the spirits at any time to enforce the lien. But the act does not so provide. It could not authorize a breach of contract.

SECOND. Because no spirits are permitted by the United States to leave the warehouse until the Government tax of $1.10 per gallon has been paid. So that even if he had the warehouse certificate he would be obliged to pay an enormous tax to the Government in order to collect the smaller tax he pays the State and county or city. The hardship of the case can be illustrated by an example. Suppose 100 barrels of whiskey are assessed at $800, and the distiller pays the State and city tax—say 2 per cent., or $16. To reimburse himself he must pay the Government tax of $1.10 per gallon on all the spirits in one barrel, for example, amounting, at forty gallons to the barrel, to $44, before he can withdraw them from the warehouse, in order to begin the enforcement of the lien by the slow and expensive machin-

ery of equity. He must employ counsel to conduct the suit in equity and must pay all the costs and expenses incident to the proceeding and sale of the whiskey. But the act of assembly does not provide that he may reimburse himself for his expenses. Nor is this all. It has already been said that the owner is permitted by act of Congress to leave the spirits in the bonded warehouse, tax free, for eight years. Suppose whiskey made and sold on December 31, 1900, to a purchaser and placed in the warehouse the same day, this law requires the distiller to pay the taxes on it for the ensuing year. After he has done so he must wait until the year 1908 before he can collect the tax so paid; if the owner takes the benefit of the act of Congress and does not come for the whiskey until the expiration of the eight years. During all these eight years the distiller must insure the whiskey to protect his lien against destruction by fire, and must run all the risk of leakage and breakage and evaporation and the danger of loss from collapse of the warehouse, and he must lose the interest on the amount of tax paid. The act of assembly does not say that he may recover the insurance, nor the interest on the money paid out in the payment of the tax, *nor does it even provide that the owner shall be liable to him personally for the amount of the tax paid for his account.* In case of destruction or loss of the spirits by leakage or breakage—causes of loss against which the distiller can probably obtain no insurance—he has no remedy at all, for his lien is gone and the act gives him no claim against the owner personally.

B.

Again, it is said by the court that the act makes the distiller or warehouseman a *collector* of the tax for the State and city or county, which the legislature has the right to do, and that the act is similar in all respects to the provisions of the Code, which provide for the payment by corporations

of the taxes levied against their stockholders upon shares of stock held by them. It may be conceded that the act was probably modeled after the act taxing shares of stock of Maryland corporations, which provides that the corporation shall pay the tax upon the shares of stock and charge the same to the stockholder, and in the case of non-resident stockholders shall also have a lien upon their stocks.

Art. 81, secs. 138 and 141, Code of Public General Laws of Md.

But there is a great and fundamental difference between the relation of the corporation and its stockholders and the warehouseman and the owner of spirits deposited in his bonded warehouse subject to the Government tax of $1.10 per gallon.

The warehouseman has no funds of the owner of the spirits out of which he can pay the tax, but must pay it out of his own funds, *whereas the stockholder is the owner of an undivided interest in all the corporate property and assets.* When, therefore, the corporation pays the tax on the stock of the stockholder, *it pays it with his money.* It matters not that nothing is presently due to the stockholder. The payment is made with his capital. The corporation is, in such a case, in truth nothing but a collector in paying the tax; but the warehouseman, having no funds of the owner of the spirits in his possession, must necessarily pay with his own, and he is therefore not a collector, but is made liable for another's debt, and such was the intention of the act, as already shown, for it provides that he shall have a lien for the tax so paid.

And another distinction consists in the fact that the corporation is a creature of the State, which might well compel it to pay another's tax as a condition of its existence and exercise of powers which it can derive from the State alone.

These views fully distinguish from the one at bar the case of New Orleans *vs.* Houston, 119 U. S., 265, and the Mary-

land cases and others dealing with the validity of tax laws requiring the corporation to pay the taxes levied on the stock of the stockholders.

C.

Then, again, it is said that it is lawful to require the person in possession of tangible personal property, whether he be the owner or not, to pay the taxes thereon, and Cooley on Taxation is cited as an authority for the porposition, and it is said that numerous cases are cited by him in support of this proposition. None of them, however, are decisions of this court, and many of them do not touch upon this point at all. But it may well be conceded that as a general proposition the person in possession may be required to pay the tax, without impairing the argument against the act of 1892, for the case of the owner of a bonded distillery warehouse is far different from that of one in possession of tangible personal property; the latter, having the tangible property on which the tax is due actually in his possession, has the means of immediately providing the money to pay the tax by the sale or pledge of the chattel, or, in the instance of a tenant referred to in the opinion of the Court of Appeals in this case, he has the accruing rent in his own hands with which to pay, whereas, as has already been shown, the warehouseman not only has not the physical possession of the spirits, which, on the contrary, are in a bonded warehouse under the lock and key of a Government official and cannot be withdrawn without the payment of the Government tax; but if he had the possession he could not use the spirits to raise the money, for the reason that the certificate or warehouse receipt representing their ownership is outstanding, and their removal from the warehouse without its return and cancellation is prohibited by law and made a high penal offense.

The only apology or justification which can be made for a law requiring one having possession, without ownership, of

tangible property to pay the tax thereon is that he has the means of immediately providing himself, at the expense of the owner, with the funds necessary to pay the tax, and where the conditions created by law are such, as in the case of the distiller or warehouseman, that this cannot be done, the analogy fails.

D.

But further, the Court of Appeals says that the supreme court of Kentucky, in Commonwealth *vs.* Gaines, 80 Ky., 489, under a statute exactly similar to the act of 1892, held the tax constitutional.

It is submitted, however, that the constitutional question here presented was neither raised nor considered, so far as the report of the case shows, and that decision cannot be considered as bearing upon this present controversy. Moreover, the statute was not like the Maryland statute, though that may not be material (see p. 493).

In the subsequent case of *Commonwealth vs. Taylor*, 101 Ky., 327, the court did have before it a statute quite similar to the Maryland statute, but the constitutional questions presented in this present case were not raised or discussed, and the only constitutional questions referred to in the report were questions concerning the constitution of Kentucky. The case, however, contains a graphic account of the complete control and possession by the United States internal revenue officials of the bonded warehouse and its contents.

E.

Next it is said by the Court of Appeals that the distiller may, if he sees fit, so frame his certificates as to impose upon the purchaser the duty of supplying him with funds with which to pay the tax. But it is submitted that a tax statute which imposes upon a contracting party the necessity of

abandoning the usual mode of conducting business of the character in which he is engaged and burdening his contracts with such stipulations cannot be a reasonable and just exercise of legislative power, nor within the constitutional powers of the legislature. It is an unreasonable interference with the freedom of contract. It would destroy the ability to contract according to customary commercial practices, and any unusual stipulation in the certificates affecting their salability would be a most serious interference with the business of distillers and warehousemen.

It is not denied that the legislature, in the exercise of its power to make police regulations, may place *restrictions* upon the conduct of business, and regulate it for the general good, and fix rates when the business is of a *public* nature. Such provisions are negative or restrictive in their operation, and, as a general, if not universal, rule, valid legislative enactments affecting the freedom of contract will be found to be of this character.

But if this statute would force the distiller, in order to protect himself, to insert in the certificates stipulations that the holder should furnish him with funds to pay the tax, it is not restrictive or negative, but positive in its operation and imposes a new burden, and in that respect goes a step farther than the kind of legislation to which we have referred.

Many instances of valid legislation affecting freedom of contract are mentioned in the opinion of the supreme judicial court of Massachusetts rendered to the legislature of that State and printed in 163 Mass., 590, &c., but they are enactments operating negatively or restrictively.

The court of appeals of New York forcibly states the limits of legislative power to interfere with the freedom of contract in the following language:

"That no general power resides in the legislature to regu-
"late *private* business, prescribe the conditions under which
"it shall be conducted, fix the price of commodities or serv-
"ices, or interfere with the freedom of contract we cannot

"doubt. The merchant and manufacturer, the artisan and "laborer, under our system of government, are left to pur- "sue and provide for their own interests in their own way, "uutrammeled by burdensome and restrictive regulations, "which, however, common in rude and irregular times, are "inconsistent with constitutional liberty."

People *vs.* Budd, 117 N. Y., 15.

The same is admitted to be the law in Frisbie *vs.* U. S., 157 U, S., 165, &c.

The act of 1892, in forcing the distiller to load his warehouse certificates with stipulations that the holders shall furnish him with funds to pay their taxes, or pay the taxes with his own funds, transcends the limit. It is no apology for requiring one to pay the debt of another to say that he may protect himself by contract. Can the State excuse itself for requiring the taxes of one to be paid by another by saying that he may protect himself by contract?

Such stipulations would be ineffective, and the practical result would be that the distiller would have to provide his own funds to pay the tax; so that the suggestion of the Court of Appeals leads back to the inquiry already argued in this brief, whether the distiller can be forced by the legislature to use his own funds to pay the taxes of the unknown owners of spirits in his bonded warehouses, in consideration of a lien which he cannot enforce until the owner presents the certificate to take away the goods and submit to the deprivation of the use of his funds so laid out and all the attendant risks of loss.

It is not for us to suggest a law which would be constitutional. It is enough to show that the act of 1892, in the form in which it is drawn and is construed by the Court of Appeals, is unconstitutional.

If the views we have set forth are sound, it follows that the demurrer to the third, fourth, and fifth counts of the amended declaration ought to have been sustained; and as the case progressed, that the offers of evidence tendered by

the plaintiffs in error at the trial ought to have been accepted and the evidence admitted, and that the prayers of the defendant in error should have been refused and those of the plaintiffs in error granted, and that the trial court and the Court of Appeals in affirming its rulings committed the errors complained of and set forth in the assignments of error in the record and in this brief.

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